Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA

Respondents

APPLICANT'S RESPONDING MOTION RECORD

(in Response to Respondents' Motion to Strike Notice of Application)

Aniz Alani
[redacted]

Applicant

On his own behalf

Department of Justice
Regional Director General's Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Solicitor for the Respondent

Jan Brongers and Oliver Pulleyblank
Counsel

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Date: 20150216

Docket: T-2506-14

Vancouver, British Columbia, February 16, 2015

PRESENT: Case Management Judge Roger R. Lafrenière

BETWEEN:

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and

THE PRIME MINISTER OF CANADA AND THE GOVERNOR GENERAL OF CANADA

Respondents

ORDER

UPON a case management conference having been held this day by teleconference with counsel for the parties, and upon hearing the submissions of the Applicant and counsel for the Respondents;

THIS COURT ORDERS that:

1. The Applicant's informal request that the hearing of the Respondents' motion to strike be adjourned and heard at the outset of the hearing of the application is dismissed.

2. Any application or submissions that the Applicant may wish to make with respect to amendments to the Notice of Application or adverse costs immunity should be included in the Applicant's motion record in response to the Respondents' motion to strike.

3. The matters of the procedure for making submissions with respect to the Respondents' Rule 318 objection and the possibility of referring the proceeding to a dispute resolution conference are deferred pending disposition of the Respondents' motion to strike.

"Roger R. Lafrenière"
Case Management Judge

I HEREBY CERTIFY that the above document is a true copy of the original filed of record in the Registry of the Federal Court the 16 day of Feb, A.D. 2015.

Dated this 16 day of Feb, 2015.

Tamsin Ramsay, Registry Officer

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FEDERAL COURT

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THE GOVERNOR GENERAL OF CANADA

Respondents

WRITTEN REPRESENTATIONS OF THE APPLICANT

(in Response to Respondents' Motion to Strike Notice of Application)

Aniz Alani
[redacted]

Applicant

On his own behalf

Department of Justice
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OVERVIEW

> The maintenance, to be sure, of the specified number of members in the Senate was very carefully provided for by the wording of two sections of the BNA Act. In addition to section 24, which provides for the appointment of Senators, section 32 says: "When a vacancy happens in the Senate, by resignation, death or otherwise, the Governor General shall by summons to a fit and qualified person fill the vacancy." The reason that the Senate does not have a provision similar to the one in force in the House of Commons regarding a time limit within which vacancies must be filled is that the constitution itself is so clear and plain upon the subject. It distinctly says that appointments shall (not "may") be made when vacancies occur. This certainly does not mean the moment they occur because that would be impracticable. The principle in interpreting directory words of this kind is that the action must be taken within a reasonable time.
>
> - Frank Andrew Kunz, *The Modern Senate of Canada* [1]

1. The Respondents seek to summarily dismiss an application for judicial review challenging the failure to fill Vacancies in the Senate.

2. The central issue raised in the application is whether qualified persons must be appointed to fill Vacancies in the Senate within a reasonable time.

3. Because the Governor General's formal power to appoint Senators is only exercised on the advice of the Privy Council on the recommendation of the Prime Minister, the application targets the non-exercise of jurisdiction by the Prime Minister rather than relying artificially on the Governor General's formal duty to appoint Senators as expressly required "When a Vacancy happens" under section 32 of the *Constitution Act, 1867*.[2]

4. The Respondents' motion to strike seizes on the application's attempt to

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[1] (Toronto: University of Toronto Press, 1965) at 57 (Footnote omitted). (App. BoA II, p. 558)

[2] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. ["*CA1867*" or "*Constitution Act, 1867*"]. (Applicant's Motion Record, Appendix A)

review the *de facto* exercise of power by the Prime Minister as involving non-justiciable constitutional conventions outside the jurisdiction of the Federal Court.

5. At issue in this motion is whether the Federal Court – rather than the provincial superior courts - has jurisdiction to judicially review the Prime Minister's unilateral inaction, which has the practical effect of rendering nugatory the express textual provisions of the *Constitution Act, 1867,* and whether the legal requirement to fill Vacancies in the Senate is justiciable.

PART I – FACTS

6. On December 4, 2014, the Prime Minister communicated publicly an intention not to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate.[3]

7. On December 8, 2014, the Applicant filed a notice of application for judicial review in this proceeding.[4]

8. The application seeks, *inter alia*, a declaration that the Prime Minister must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after the Vacancy happens.[5]

PART II – ISSUES

9. There are four issues before the Court on this motion:

   i) Are the issues raised in the application for judicial review justiciable?

   ii) Does the Federal Court have jurisdiction over the subject matter of the application for judicial review?

   iii) Should the Applicant be granted leave to amend the Notice of Application?

   iv) What is an appropriate order as to costs of the motion?

[3] Notice of Application (Respondents' Motion Record, p. 6)
[4] *Ibid*. (Respondents' Motion Record, p. 4)
[5] *Ibid*. (Respondents' Motion Record, p. 6)

PART III – SUBMISSIONS

A. BACKGROUND

10. The application seeks declaratory relief interpreting and giving effect to s. 32 of the *Constitution Act, 1867* and, in particular, determining whether the requirement to summon qualified persons to the Senate "when a Vacancy happens" imposes an obligation to cause appointments to be made within a reasonable time.[6]

11. The relief sought in the notice of application is informed by the following:

    i) The Constitution mandates that the Senate shall be composed of 105 Senators.[7]

    ii) As of March 20, 2015, there are 87 Senators, inclusive of suspensions.[8]

    iii) A specific number of Senators are required to be appointed from each province and territory.[9]

    iv) Seven provinces currently lack that constitutionally mandated representation.[10]

    v) Since September 6, 2012, the Senate has not consisted of 105 Senators.[11]

    vi) No person has been appointed to the Senate since March 25, 2013.[12]

12. The Respondents rely on Rules 3, 4 and 221 in moving to strike. Section

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[6] *Ibid*. (Respondents' Motion Record, p. 6)
[7] *CA1867*, *supra* note 2, s. 21. (Applicant's Motion Record**,** Appendix A)
[8] Library of Parliament, "Party Standings in the Senate – Forty-first (41st) Parliament", online: Parliament of Canada <abbreviated URL: http://bit.ly/SenateStandings41>; retrieved: March 16, 2015. ["Library of Parliament"]. (App. BoA II, p. 561)
[9] *CA1867*, *supra* note 2, s. 22. (Applicant's Motion Record**,** Appendix A)
[10] Library of Parliament, *supra* note 8. (App. BoA II, p. 561)
[11] *Ibid*. (App. BoA II, p. 561)
[12] *Ibid*.

18.4(1) of the *Federal Courts Act* requires that applications "be heard and determined without delay and in a summary way". The Applicant therefore responds as if the Respondents had requested a preliminary determination of a question of law under Rule 220, which is final and conclusive subject to being varied on appeal.

13. In any event, neither Rule 220 nor 221 apply to applications. The Court's implied or inherent jurisdiction to control its own process is thus engaged.

B. JUSTICIABILITY

14. Although the formal power to appoint Senators is vested in the Governor General by the express text of the *Constitution Act, 1867*, as a matter of constitutional convention such appointments are only made on the recommendation of the Prime Minister.[13]

15. By seizing on the applicability of a convention, the Respondents argue that the appointment of Senators is beyond the purview of the Courts and that any related controversy may only be dealt with in the political realm.

16. The Respondents' objection that the subject matter of the application is non-justiciable cannot be sustained because:

    i) it confuses the enforcement of conventions with their justiciability;

    ii) the Court is not being asked to enforce constitutional conventions;

    iii) Courts regularly issue declarations addressing "unenforceable" constitutional conventions;

    iv) insulating executive behaviour from judicial review undermines the rule of law;

[13] *Reference re: Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704 at para. 50. ["*Senate Reform Reference*"]. (Resp. BoA II, Tab 19)

v) the distinction between law and convention is no longer supported in law;

vi) the Governor General is legally required to act on the advice of his Ministers; and

vii) the issues in the application are amenable to the judicial process.

i) Enforceability vs. justiciability of constitutional conventions

17. Dean Lorne Sossin distinguishes justiciability from enforceability thusly:

> Occasionally, a court will refer to a matter as non-justiciable in the sense that a court will not or cannot enforce a remedy. These are related concepts but it is important to distinguish between a non-justiciable matter and a matter unenforceable by the courts. **The classic illustration of this distinction in Canadian law is the constitutional convention.** Constitutional conventions are unwritten rules which governments are obliged to follow. However, if these conventions are not followed, a court cannot enforce them. The violation of a convention, in other words, gives rise to political, not legal sanctions. **Conventions are thus justiciable in the sense that a court could interpret the scope of a convention and declare whether a convention has been breached by government action.** They are unenforceable, however, in the sense that a court cannot compel a government to act in accordance with a convention.[14]

18. The Respondents' objection is premised on the incorrect understanding that constitutional conventions must be enforceable in order to be justiciable. Even if the Court determines that the application seeks judicial enforcement of constitutional conventions, which is denied,[15] the Respondents' objection on

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[14] Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd Ed., 2012, Toronto: Carswell. at pp. 11-12. (Footnotes omitted; emphasis added.) (App. BoA II, pp. 606-607)

[15] Léonid Sirota, "Towards a Jurisprudence of Constitutional Conventions" (2011), *Oxford University Commonwealth Law Journal* 29 at 40 ["Sirota"] (App. BoA II, p. 592); Lorne Sossin, "The Unfinished Project of *Roncarelli v. Duplessis:* Justiciability, Discretion, and the Limits of the Rule of Law" (2010), 55 *McGill L.J.* 661 at 686 ["Sossin 2010"] (App. BoA II, p. 655); Mark D. Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011), 5

this basis must fail.

19. In any event, the Court is not being asked to order the Prime Minister or the Governor General to do anything. If the Court allowed the application for judicial review and issued a declaratory order setting out a requirement to fill Senate vacancies, the Applicant concedes that enforcement of the order may rest exclusively in the domain of political sanctions rather than judicially imposed penalties.[16]

ii) The Court is not being asked to enforce constitutional conventions

20. The Respondents' focus on the role of convention in the appointment of Senators is misplaced because nothing in the application calls on the Court to enforce conventions, either in the face of conflicting laws[17] or at all.

21. The Applicant is <u>not</u> challenging the Governor General's *failure* to follow the advice of the Prime Minister regarding Senate appointments -- a challenge that would necessarily rely on constitutional convention, and which, on the orthodox distinction between law and convention, could not result in an enforceable judgment.

22. To illustrate the non-materiality of the convention at issue, it is helpful to consider an alternate fact scenario in which the Prime Minister advises the Governor General to appoint John Doe to the Senate. Instead, the Governor General summons Jane Smith.

23. The Court in such a case would be required, under the orthodox view, to prefer the "law" expressed in section 32 of the *Constitution Act, 1867*, which grants formal appointment power to the Governor General, over the

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Journal of Parliamentary and Political Law 127at 146 ["Walters"]. (App. BoA II, p. 677)

[16] Sirota, *ibid*. at 42-43. (App. BoA II, pp. 594-595); *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470 at para. 65 ["*OECTA*"] (Resp. BoA I, Tab 11)

[17] Sirota, *ibid*. at 35-36. (App. BoA II, pp. 587-588)

"conventional rule" that such appointments be made on the advice of the Prime Minister.

iii) Courts regularly issue declarations addressing "unenforceable" constitutional conventions

24. The Respondents' objection is grounded in a selective reading of the Supreme Court of Canada's judgment in the *Patriation Reference.*[18]

25. The Supreme Court of Canada's handling of the reference questions on the amendment of the Constitution illustrates that, while the Court was not prepared to consider conventions as court-enforceable rules, it was prepared to discuss the conventions in detail[19].

26. Indeed, the majority recognized that it would be following judicial practice in discussing the existence and content of a convention.[20]

The *Patriation* and *Secession References*

27. Both the *Patriation Reference*[21] and the *Secession Reference*[22] provide examples of the Court's role in defining the scope of constitutional conventions where necessary to interpret the Constitution.

28. By issuing written judgments declaring, respectively, the constitutional requirements for amending the Constitution and for effecting the lawful secession of a province from Confederation -- including those requirements imposed by convention and expressly recognized as being judicially

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[18] *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ["*Patriation Reference*"], (Resp. BoA II, Tab 18)
[19] Andrew David Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed. (Toronto: Oxford University Press, 2014) at 29-30 ["Heard"] (App. BoA II, pp. 524-525); Sirota, *supra* note 15 at 34. (App. BoA II, p. 586)
[20] *Patriation Reference*, *supra* note 18 at 885 (Resp. BoA II, Tab 18)
[21] *Ibid*.
[22] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 DLR (4th) 385["*Secession Reference*"], (Resp. BoA II, Tab 20)

unenforceable – the Court performed its proper interpretive function in a manner that had the practical effect of resolving the underlying uncertainty in each case. [23]

29. The fact that the Court would not be in a position to impose legal sanctions for non-compliance with the constitutional conventions declared to exist in each case was not a "show stopper".

The "*Persons Case*": Judicial Interpretation of Senate Appointment Power

30. The 1928 landmark decision of the Judicial Committee of the Privy Council in what is commonly known as the "Persons Case" is widely celebrated for Viscount Sankey's famous articulation of the "living tree" approach to Canada's Constitution. Fundamentally, this watershed case raised a matter of statutory interpretation.[24]

31. At issue was the interpretation of the scope of the Governor General's power to appoint Senators under section 24 of the (then) *British North America Act, 1867*, and, in particular, whether the power to appoint qualified "Persons" in that provision permitted the Prime Minister to recommend women for appointment to the Senate.

32. Neither the Supreme Court of Canada[25] nor the Law Lords refused to rule on a matter that touched on constitutional convention. The judgments had the practical effect of redefining the scope of the advice the Prime Minister might lawfully give to the Governor General when recommending appointments. By recognizing the question before them as one of constitutional statutory construction, the Courts appropriately performed their interpretive function

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[23] With respect to the *Patriation Reference*, see Sirota, *supra* note 15 at 43. (App. BoA II, p. 595

[24] *Edwards v. Attorney General (Canada),* [1929] UKPC 86, [1930] A.C. 124 ["*Persons Case*"] (App. BoA, I, pp. 186-199)

[25] *Reference re: meaning of the word "Persons" in s. 24 of British North America Act*, [1928] S.C.R. 276, 1928 CanLII 55, [1928] 4 D.L.R. 98 (S.C.C.) (App. BoA II, pp. 381-409)

and provided lasting clarity as to the meaning of Canada's Constitution.

OECTA: Non-Enforcement does not Preclude Declaratory Relief

33. The 2001 decision in *OECTA* is the Supreme Court of Canada's most recent restatement of the "non-enforceable convention" rule cited by the Respondents.[26] In that case, a private litigant asked the Court to invalidate express legislation on the basis of its incompatibility of constitutional convention.

34. After referencing the distinction between the judicially enforceable law of the Constitution and the conventions of the Constitution, which carry only political sanctions, the Court went to state:

> The OPSBA appellants nevertheless seek a declaration that a constitutional convention exists regarding the right of school boards in Ontario to levy and determine property taxes for education purposes, **presumably so that they could then seek a remedy for a violation of this convention in the appropriate forum.**[27]

35. By the Respondents' logic, the acknowledged unenforceability of a convention would have required the Court to strike the claim as non-justiciable. It did not do so. Instead, the Court undertook a factual analysis of whether the proposed constitutional convention was supported by historical evidence. It found that the test for recognizing a constitutional convention had not been satisfied, and the claim failed on its merits.

36. In the instant case, the existence of the only relevant constitutional convention – namely that the Governor General will only appoint Senators on the advice of the Prime Minister - has already been declared by the Supreme Court of Canada.[28] All that remains, much like in the *Persons Case*, is to interpret the textual provisions of the Constitution and review the legality of the unfilled

[26] *OECTA*, *supra* note 16 (Resp. BoA I, Tab 11)
[27] *Ibid.* at para. 65. (Emphasis added.)
[28] *Senate Reform Reference*, *supra* note 13 at para. 50. (Resp. BoA II, Tab 19)

Senate vacancies accordingly.

Conacher v. Canada: Justiciability of Conventions regarding Dissolution of Parliament

37. In *Conacher*, the Federal Court considered an application for judicial review of the Prime Minister's decision to advise the Governor General to dissolve the 39th Parliament.[29] Shore J., relying on the Federal Court of Appeal's judgment in *Pelletier*,[30] held that the Federal Court had jurisdiction to determine questions of convention.[31]

38. Shore J. noted that the *Pelletier* Court *dismissed* a convention argument in part on the grounds that the respondent would have had to serve notice of a constitutional question on the Attorneys General of Canada and the provinces pursuant to section 57 of the *Federal Courts Act* before their claim could be heard because the convention "would have an effect on the validity of the second termination order".[32]

39. Having been satisfied that the Prime Minister's decision was appropriate for judicial review, Shore J. considered whether a constitutional convention had been created whereby the Prime Minister's discretion to advise the Governor General to dissolve Parliament could only be exercised in accordance with "fixed election date" legislation in the absence of a non-confidence vote. Applying the test set out in the *Patriation Reference* for recognizing a constitutional convention, Shore J. concluded that the historical facts did not establish the existence of the suggested convention.[33]

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[29] *Conacher v. Canada (Prime Minister)*, 2009 FC 920, [2010] 3 F.C.R. 411, 311 D.L.R. (4th) 678, [2009] F.C.J. No 1136 (QL) at para. 1. ["*Conacher FC*"] (App. BoA I, p. 174)
[30] *Pelletier v. Canada (Attorney General)*, 2008 FCA 1, [2008] 3 F.C.R. 40, 289 D.L.R. (4th) 77 ["*Pelletier*"]. (Resp. BoA I, Tab 14)
[31] *Conacher FC*, *supra* note 29 at para. 32. (App. BoA I, p. 178)
[32] *Pelletier*, *supra* note 30 at para. 21 (Resp. BoA I, Tab 14), as cited in *Conacher FC*, *supra* note 29 at para. 33. (App. BoA I, p. 179)
[33] *Conacher FC, supra* note 29 at paras. 34-47. (App. BoA I, pp. 179-181)

40. On appeal, Stratas J.A., on behalf of a unanimous court, held that "Section 56.1 [of the *Canada Elections Act*] must be interpreted in light of the constitutional status and role of the Governor General."[34] The Court specifically acknowledged the interplay between the fixed election date legislation, the *Constitution Act, 1867*, and the constitutional conventions surrounding the Governor General's status, role, powers and discretions. However, the Court agreed that, based on the evidence, the suggested convention did not exist.[35]

Courts Give Effect to Convention Where Necessary to Explain State Action

41. In addition to indicating a willingness to give effect to constitutional conventions where the requisite factual basis for their existence exists (as in *OECTA*[36] and *Conacher*)[37] and procedural requirements for using convention as the basis for reviewing the validity of legal instruments have been met (as in *Pelletier*)[38], the Courts have also "enforced" constitutional conventions by relying on them as the basis for justifying state action.

42. For example, in *Galati*, the Federal Court dismissed an application for judicial review of the Governor General's decision to grant Royal Assent to the *Strengthening Citizenship Act*.[39] In that case, Rennie J. relied on constitutional convention in determining that legislative acts were non-justiciable:

> [39] No legal doctrine nor precedent was identified in argument which would justify the insertion of the courts into an assessment of the lawfulness of legislation as it progresses through Parliament. **Indeed, the argument rails against both precedent and convention.** Responsible government, at its core, requires that the democratically elected representatives of Canadians determine what laws are enacted by Parliament. […]

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[34] *Conacher v. Canada (Prime Minister)*, 2010 FCA 131, [2011] 4 F.C.R. 22 at para. 4. ["*Conacher FCA*"] (Resp. BoA I, Tab 5)
[35] *Ibid.* at para. 12. (Resp. BoA I, Tab 5)
[36] *Supra* note 26. (Resp. BoA I, Tab 11)
[37] *Conacher FCA*, *supra* note 34. (Resp. BoA I, Tab 5)
[38] *Pelletier*, *supra* note 30 (Resp. BoA I, Tab 14)
[39] *Galati v. Canada (Governor General)*, 2015 FC 91. (Resp. BoA I, Tab 7)

> [46] **While section 55 [of the *Constitution Act, 1867*] confers a discretion on the Governor General whether to assent, that discretion is wholly constrained by the constitutional convention of responsible government. In granting assent, the Governor General does not exercise an independent discretion. He acts on the advice of the Prime Minister.** […][40]

43. As Andrew Heard observes, the Supreme Court of Canada has itself relied heavily on the conventional relationship between a legislature and its government in deciding cases even outside of the reference context.[41]

44. In *Arseneau v. The Queen*,[42] the Supreme Court of Canada extended the circumstances in which a criminal charge could be laid by drawing on the conventional relationship between the Cabinet and the legislature to allow the prosecution, under a charge of bribing a *member of the legislature*, of a person who had corruptly paid money to a *minister*.[43]

45. In *Blaikie*, constitutional convention was used to extend the bilingualism requirement under s. 133 of the *Constitution Act, 1867* to cover regulations enacted by the government of Quebec.[44]

46. In both *Arsenault* and *Blaikie*, Professor Heard observes that "the conventions were used as an interpretive means to extend a rule of positive law."[45]

iv. Insulating executive behaviour from judicial review undermines the rule of law

47. If the exercise of federal administrative power were non-justiciable in all cases where its definition depended at all on convention, a great deal of

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[40] *Ibid.* at paras. 39, 46 (Emphasis added). (Resp. BoA 1, Tab 7)
[41] Heard, *supra* note 19 at 31, 90. (App. BoA II, pp. 526, 528)
[42] [1979] 2 S.C.R. 136 at 149 ["*Arseneau*"]. (App. BoA I, p. 14)
[43] Heard, *supra* note 19 at 31, 90-91. (App. BoA II, pp. 526, 528-529)
[44] *Attorney General of Quebec v. Blaikie et al.*, [1981] 1 S.C.R. 312, 1981 CanLII 14 at 320-321 ["*Blaikie*"]. (App. BoA I, pp. 25-26); Heard, *supra* note 19 at 91. (App. BoA II, p. 529)
[45] Heard, *supra* note 19 at 92. (App. BoA II, p. 530)

federal administrative power would be beyond the scope of judicial review.

48. For example, all executive action of the Governor in Council would be non-justiciable because, by convention, the act or decision was, in formal terms, made by the Governor General "on the recommendation and advice of" the federal Cabinet.

49. By the Respondents' logic, the Federal Court could never exercise its statutory powers under s 18.1(3)(a) of the *Federal Courts Act* to "order [the Governor in Council] to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing" or under s. 18.1(3)(b) to "set aside and refer back for determination in accordance with such directions as it considers to be appropriate … a decision, order, act or proceeding of [the Governor in Council" because to do so would be to "enforce" the convention that the Governor General acts only on the advice of his ministers.

50. It is not inappropriate for Courts to review such decisions even when doing so has the practical effect of "enforcing" conventions.[46]

51. The alternative of flipping the "on/off" switch of justiciability to shield large swaths of executive power from the scope of judicial review wherever that power is exercised against the backdrop of constitutional convention would have the perverse effect of undermining the rule of law.[47]

v) The distinction between law and convention is no longer supported in law

52. The correctness of the rigid orthodox distinction between convention and law is questionable in light of recent Canadian jurisprudence, which reflects an aversion to privileging form over substance by ignoring political reality

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[46] Walters, *supra* note 15 at 142. (App. BoA II, p. 673)
[47] Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002), 47 McGill L.J. 435 at 451, 454-456 ["Sossin 2002"] (App. BoA II, pp. 624, 627-629); Sossin 2010, *supra* note 15 (App. BoA II, pp. 630-657).

informed by conventions when interpreting the Constitution.[48]

53. Professor Mark Walters describes the obsolescence over time of the suggested orthodox distinction:

> The orthodox view of the matter just described cannot be right. It is possibly incorrect in relation to British law (though we shall not pursue that possibility here), and it is certainly incorrect in relation to Canadian law. The problem is that it fails to account for a long line of cases in which Canadian judges have slowly worked out the implications of Canada's commitment to the British sense of parliamentary democracy within a constitutional system dominated but not exhausted by entrenched written constitutional texts.[49]

54. In the *Senate Reform Reference*, the Supreme Court of Canada reiterated that the Constitution must be interpreted with regard to its "internal architecture" or "basic constitutional structure".[50] In particular, the Court updated the rules and principles of interpretation:

> … [T]he Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.

55. In rejecting the Attorney General of Canada's argument that consultative elections did not interfere with the Governor General's appointing power, the Court noted the phrase "the method of selecting Senators" in s. 42(1)(b) of the *Constitution Act, 1982* extended constitutional protection "to the entire process by which Senators are 'selected'" rather than merely "the formal appointment of Senators by the Governor General".[51]

56. To the extent that the historical orthodox dichotomy of convention and law as

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[48] *Senate Reform Reference*, *supra* note 13 at paras. 52, 65-67, 106. (Resp. BoA II, Tab 19)
[49] Walters, *supra* note 15 at 136. (App. BoA II, p. 667)
[50] *Senate Reform Reference*, *supra* note 13 at paras. 23, 25-27. (Resp. BoA II, Tab 19)
[51] *Ibid*. at para. 65.

adopted in the *Patriation Reference* is relied on as authority for the non-justiciability of the application, it is open to the Court to revisit conclusions reached in earlier cases where there has been an evolution in the law,[52] arguments not raised in previous cases, or a significant change in understanding of the legal principles to be applied.[53]

57. In this case, our understanding of the Constitution's "internal architecture" as discussed in the *Senate Reform Reference* reflects an evolution in the law and a significant change over the approach reflected in the *Patriation Reference*.

vi) The Governor General is legally required to act on the advice of his Ministers

58. The Respondents characterize the Prime Minister's role in advising the Governor General as arising merely by convention. However, the principles of responsible government that require the Governor General to act on the advice of his Ministers are grounded in law, including the text of the Constitution.[54]

59. The Preamble and sections 9 and 11-13 of the *Constitution Act, 1867*,[55] as well as Article II of the *Letters Patent, 1947*,[56] provide that the powers of the Governor General are exercised with the advice of the Queen's Privy Council for Canada.[57] When read together with section 32, which requires the Governor General to appoint Senators "when a Vacancy happens", the law and not merely convention requires that the Governor General perform that

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[52] Walters¸ *supra* note 15 at 128. (App. BoA II, p. 659); see also Heard, *supra* note 19 at 220-230 (App. BoA II, pp. 531-541)
[53] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras. 42, 44-45. (App. BoA I, pp. 64-66)
[54] *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2, 1987 CanLII 71 (SCC) at pp. 38, 43, 45-46. (App. BoA I, pp. 297, 302, 304-305)
[55] *Supra*, note 2. (Applicant's Motion Record, Appendix A)
[56] *Letters Patent Constituting the Office of the Governor General of Canada, 1947*, R.S.C. 1985, Appendix II, No. 31. (Applicant's Motion Record, Appendix A)
[57] *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 at para. 63. (App. BoA II, pp. 471-472)

function on the advice of his Ministers. [58]

vii) The issues in the application are amenable to the judicial process

60. Rather than deferring to rigid and un-nuanced pre-defined categorizations of what cases will not be justiciable, justiciability should be determined on a case-by-case basis according to a determination of legitimacy and capacity of the courts to adjudicate a matter.[59]

61. The Federal Court of Appeal's recent decision in *Hupacasath First Nation* considered the issues of justiciability and jurisdiction in the context of Canada's negotiation of a investment promotion and protection agreement with the People's Republic of China. Stratas J.A., writing for a unanimous Court, found that the issues raised in the judicial review proceeding were both justiciable and within the Federal Court's jurisdiction.[60]

62. Of particular relevance to the justiciability of the issues raised in the instant case are the Court's observations that:

i) Whether the question before the Court is justiciable bears no relation to the source of the government power.[61]

ii) In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is executive accountability to legal authority and protecting individuals from arbitrary executive action.[62]

iii) Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, i.e., within a range of acceptability and defensibility, and

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[58] Walters¸ *supra* note 15 at 134. (App. BoA II, p. 665)
[59] Sossin 2002, *supra* note 47 at 447-449, 451. (App. BoA II, pp. 620-622, 624)
[60] *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4 ["*HFN*"]. (App. BoA I, pp. 200-241)
[61] *Ibid*. at para. 63. (App. BoA I, p. 220)
[62] *Ibid.* at para. 66. (App. BoA I, p. 221)

that assessment is the proper role of the courts within the constitutional separation of powers.[63]

iv) The category of non-justiciable cases is very small.[64]

63. Although not determinative, it is noteworthy that when responding to the suggestion that the Prime Minister's failure to advise the Governor General to fill Senate vacancies was unconstitutional, Peter Van Loan, then the Minister for Democratic Reform, took the position that a constitutional challenge would have been justiciable. Indeed, he argued that the absence of a legal challenge to date supported the constitutionality of the Prime Minister's inaction:

> **Mr. Van Loan:** … This question is raised about constitutionality, this question of compelling the Prime Minister and whether the organization can exist. If there is a requirement that those spots be filled, if it is, as the chair has indicated, that they must be appointed when, again any one of you could take that question with the courts. You could seek injunctive relief, a mandamus that the Prime Minister fill those appointments. If none of you are keen to try that approach, then I expect –
>
> **Senator Murray:** Are you giving us legal advice?
>
> **Mr. Van Loan:** I am saying the fact that this has not happened, that no one has done that, tells me that probably there is no requirement for that to occur.[65]

64. The justiciability of the constitutional issues raised in the application is also supported by the Supreme Court of Canada's observation in the *Manitoba Language Rights Reference* that "[t]he judiciary is the institution charged with

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[63] *Ibid.*
[64] *Ibid*., para. 67. (App. BoA I, p.222)
[65] Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings,* 39th Parliament, 2nd Session, No. 17 (7 May 2008) at 31. (App. BoA II, p. 726)

the duty of ensuring that the government complies with the Constitution."[66]

65. The "duty of the judiciary" as described above is performed having due regard for the courts' role vis-à-vis the executive. As Mr. Justice Rothstein noted in an address to the American Bar Association Section of Administrative Law and Regulatory Practice, while some questions of policy are best left to the political process to resolve, "the rule of law and our Constitution require courts to engage in the judicial review of executive decisions when they conflict with the Constitution or impact on individual rights. Just as in *Marbury v. Madison*."[67]

66. Where the courts' limitations on its institutional competence prevent judges from directing the precise manner in which the law ought to be given effect, an appropriate declaratory order may be issued, as it was in *Khadr*, stating that the government's actions are unconstitutional while leaving it to the government to determine how best to respond in light of the complex political factors at play.[68] That an imprecise declaration may not be strictly enforceable is, to paraphrase Mr. Justice Rothstein, a bridge to be crossed if we come to it.[69]

C. JURISDICTION

67. The Respondents argue that the Federal Court lacks jurisdiction over the Prime Minister's advice-giving role concerning the appointment of Senators.

68. If the issues raised in the application are justiciable, but outside the Federal Court's jurisdiction, the proceeding must be litigated in the superior court of a

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[66] *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 744-745. (App. BoA I, 341-342)
[67] Hon. Mr. Justice Marshall Rothstein, "Address to the American Bar Association Section of Administrative Law and Regulatory Practice" (2011), 63 *Administrative Law Review* 961 at 964. ["Hon. Justice Rothstein"] (App. BoA II, p. 575)
[68] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paras. 2, 36-48 (App. BoA I, pp. 152, 165-169); *ibid*. at 966-968. (App. BoA II, pp. 577-579)
[69] Hon. Justice Rothstein, *supra* note 67 at 968. (App. BoA II, p. 579)

province.

69. It is beyond dispute that, in order to invoke the Federal Court's jurisdiction to grant declaratory relief under s. 18(1) of the *Federal Courts Act*, the relief must be sought as against a "federal board, commission or other tribunal".

70. Given the statutory definition of "federal board, commission or other tribunal" in s. 2 of the *Federal Courts Act*, the Federal Court's jurisdiction under s. 18(1) can only be exercised in respect of a "body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown".

71. The definition in s. 2 is "sweeping" with a scope that "run[s] the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between."[70]

72. A purposive reading of the *Federal Courts Act* and s. 101 of the *Constitution Act, 1867* suggest that the Court's jurisdiction should be interpreted broadly to permit litigants to seek administrative law remedies involving the exercise of federal powers.[71]

73. As noted in *TeleZone*, "[t]he focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process."[72]

74. A central purpose of the Federal Court is to provide a single, nationwide court with authority to supervise federal decision makers while permitting a "choice of forum" where relief was sought against the federal Crown other than in the

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[70] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at para. 3 ["*TeleZone*"]. (App. BoA I at 112)
[71] See, e.g., Harry J. Wruck, "Federal Court Jurisdiction: Will the Bleeding Ever Stop?" (2008), 66:5 *The Advocate* 711 at 715 ["Wruck"]. (App. BoA II, p. 686); *TeleZone*, *supra* note 70, at paras. 18-19, 32, 59. (App BoA I, pp. 119-120, 125, 137)
[72] *TeleZone*, *supra* note 70 at para. 26. (App. BoA I, p. 122)

nature of an administrative law remedy.[73]

75. The legal issue raised in the notice of application – namely the interpretation of the constitutional provisions regarding the appointment of Senators "when a Vacancy happens" in the Senate – properly falls within the Federal Court's jurisdiction in any one of at least three ways by recognizing that:

i) the Prime Minister, or alternatively the Queen's Privy Council for Canada, has powers conferred by or under *a prerogative of the Crown*;

ii) the Prime Minister, or alternatively the Queen's Privy Council for Canada, has jurisdiction or powers conferred by *an order made* pursuant to a prerogative of the Crown;

iii) alternatively, the declaratory relief is "claimed against the Crown" and may be issued pursuant to the Federal Court's concurrent jurisdiction under s. 17 of the *Federal Courts Act*.

i. Advice provided pursuant to a prerogative of the Crown

76. The source of the executive's advisory role concerning Senate appointments is a prerogative power, albeit a constitutionalized one. The structure of the prerogative power can be viewed in two ways.

77. The advisory role can be viewed as a prerogative power exercisable by the Prime Minister or of the Queen's Privy Council for Canada. It can also be viewed as an incident of the prerogative power of the Governor General to summon his advisors for advice in the discharge of vice-regal powers.

a) Prerogative power exercisable by the Prime Minister or Queen's Privy Council for Canada

78. The parties agree that, as a matter of fact, the Governor General appoints

[73] *HFN*, *supra* note 60 at para. 52 (App. BoA I, p. 217); *TeleZone*, *supra* note 70 at paras. 47, 49-52, 57-59. (App. BoA I, pp. 131-133, 135-137)

Senators on the advice of the Prime Minister. At issue is whether a prerogative power is exercised in the giving of that advice.

79. That the Prime Minister's authority reflects a prerogative power is supported by the Ontario Court of Appeal's judgment in *Black v. Canada*. In that case, the Prime Minister argued that the Federal Court had exclusive jurisdiction over the claim because the claim challenged the exercise of a prerogative power.[74] Conrad Black argued that "Prime Minister Chretien's communication with the Queen was grounded not in the prerogative but was a 'personal vendetta'." The Court rejected this argument by reflecting on the public and official nature of the Prime Minister's advice.[75]

80. The Ontario Court of Appeal's observation that the Prime Minister's authority must always derive from either statute or prerogative may be an oversimplification but reflects the reality that all public authority finds its source in law.[76] When acting in a public capacity, as is indisputably the case when advising on Senate appointments, his conduct is necessarily constrained by the rule of law.

b) Advisory function as an incident of the Crown prerogative

81. Professor Mark Walters explains that, historically, "it was the Crown's prerogative or common law right to summon advisors to gather in the Privy Council." The Crown's prerogative to summon advisors imposes on advisors a form of common law duty.[77]

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[74] *Black v. Canada (Prime Minister)*, 54 O.R. (3rd) 215, 199 D.L.R. (4th) 228, [2001] O.J. No 1853 (QL), 2001 CanLII 8537 (C.A.) at paras. 68, 73 ["*Black*"]. (Resp. BoA I, Tab 3)
[75] *Ibid.*, at paras. 39-40.
[76] See also Hon. Justice Rothstein, *supra* note 67 at 963 (App. BoA II, p. 574); Sossin 2002, *supra* note 47 at 443, 448. (App. BoA II, pp. 616, 621)
[77] Walters, *supra* note 15 at 143-144. (App. BoA II, pp. 674-675); see also *Rex ex rel. Tolfree v. Clark et al.*, [1943] O.R. 501, 1943 CanLII 90 (Ont. C.A.); leave to appeal to S.C.C. denied, [1944] S.C.R 69, 1943 CanLII 3 (SCC) (App. BoA II, p. 424)

82. Whether advice is given by the Queen's Privy Council for Canada, or on its behalf by the Prime Minister, it follows that the "body, person or persons" from whom the advice is sought exercises "jurisdiction or powers … under a prerogative of the Crown".

83. The approach of the Ontario Court of Appeal in *Black* that defines public authority as deriving from either statute or prerogative powers, and the common law or prerogative duty explained by Professor Walters represent two sides of the same coin. Viewed either way, the Prime Minister's advice to the Governor General arises out of a prerogative of the Crown and is therefore reviewable by the Federal Court.

ii. Order made pursuant to a prerogative of the Crown

84. The Minutes of Council issued between 1896 and 1935[78] and referenced in the Respondents' submissions represent the advice of the "Committee of the Privy Council" that "certain recommendations are the special prerogative of the Prime Minister" including the appointment of Senators.[79]

85. The Minutes of Council *themselves* are orders made pursuant to a prerogative of the Crown. Advice provided in accordance with the Minutes of Council, therefore, is advice made "under an order made pursuant to a prerogative of the Crown."

86. Peter Noonan explains the role of Minutes of Council in his text, *The Crown and Constitutional Law in Canada*, as a means to record advice given to the Sovereign's representative. In circumstances where the Prime Minister acts as

[78] P.C. 1896 – 1853 (May 1, 1896); P.C. 1896 – 1853 (May 1, 1896); P.C. 1935 – 3374 (October 23, 1935). (Resp. BoA II, Tabs 27-29)
[79] Respondents' Motion Record at p. 24; see also *House of Commons Debates*, 20th Parliament, 2nd Session, Vol. I, 1946 (1 April 1946) at 433-434 (Rt. Hon. Mackenzie King). (App. BoA II, pp. 702-703)

a quorum of the Privy Council, an Instrument of Advice is used.[80]

87. Absent the repeal, modification, or replacement of the Minutes of Council, the Governor General and the Privy Council is bound by the previously given advice that the Privy Council will only advise on Senate appointments upon the recommendation of the Prime Minister "as opposed to another Cabinet minister or Cabinet as a whole."[81]

88. It follows that, when the Prime Minister issues an Instrument of Advice to the Governor General recommending the appointment of a Senator,[82] he does so "pursuant to an order made pursuant to a prerogative of the Crown".

iii) Jurisdiction to determine issues arising under the Constitution Act, 1867

89. If the Court concludes that the notice of application is defective by reason alone that the Federal Court lacks jurisdiction under s. 18(1) of the *Federal Courts Act*, it must also consider whether the issue of filling Senate vacancies can be determined by way of an action under s. 17 of the *Federal Courts Act* by converting the application into an action under s. 18.4(2).

90. Even if the Prime Minister – or, alternatively the Queen's Privy Council for Canada – is not a "federal board, commission or other tribunal" within the meaning of s. 2 of the *Federal Courts Act*, that term is only relevant to the Federal Court's exclusive jurisdiction over such bodies under s. 18(1) and s. 18.1 of the Act.

91. The Respondents' submissions refer to the Supreme Court of Canada's judgment in *Northern Telecom*,[83] presumably in support of the proposition

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[80] Peter W. Noonan, *The Crown and Constitutional Law in Canada* (Calgary: Sripnoon, 1998) at pp. 174-175. (App. BoA II, pp. 569-570)
[81] Respondents' Motion Record at p. 25, para. 39.
[82] See, e.g., Hon. Eugene A. Forsey, "The Courts and The Conventions of The Constitution" (1984), 33 U.N.B.L.J. 11 at 18-19. (App. BoA II, pp. 497-498)
[83] *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733, 1983 CanLII 25 ["*Northern Telecom*"]. (Resp. BoA I, Tab 10)

that the Governor General's power in relation to Senate appointments is not reviewable in the Federal Court because it derives from the *Constitution Act, 1867* rather than the "laws of Canada" over which s. 101 authorizes administration by the Federal Court.

92. *Northern Telecom* is often cited for the proposition that the *Constitution Acts* are not "laws of Canada" within the meaning of s. 101 because they were not enacted by the Parliament of Canada. *Northern Telecom* should not be considered binding or persuasive authority for this far-reaching proposition.

93. As Harry Wruck explains, there is reason to doubt the correctness of the Court's *obiter* comments that give rise to the proposition for which the case is often cited:

> In *obiter dicta*, the court suggested that, since the *Constitution Act, 1867* is not a "law of Canada" because it was not enacted by the Parliament of Canada, it must follow that the Federal Court cannot grant relief based on a claim relying solely upon the Constitution. […]
>
> Prior to 1982, there was no question that the "laws of Canada" did not include the Canadian Constitution because the statutes making up the Canadian Constitution were passed by the U.K. Parliament. **This has, however, arguably changed with the enactment of the *Constitution Act, 1982*.**
>
> Section 1 of the *Canada Act, 1982* states that the *Constitution Act, 1982* is "enacted for and shall have the force of law in Canada…"
>
> Section 52(1) of the *Constitution Act, 1982* provides:
>
> > The Constitution of Canada is the *supreme law of Canada*, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.
>
> **Given that the Constitution of Canada is the supreme law of Canada, it follows that it must be a law of Canada.** […]
>
> The Supreme Court of Canada in *Northern Telecom* were unable

> to consider the effect of s. 1 of the *Canada Act, 1982* and s. 52 of the *Constitution Act, 1982* since **the facts giving rise to the *Northern Telecom* case arose in 1978, some four years prior to the coming into force of the *Constitution Act, 1982*.**
>
> However, the authors of *Federal Courts Practice 2007* suggest that this issue has not yet been resolved. No court has considered this issue in the context of s. 1 of the *Canada Act, 1982* and s. 52(1) of the *Constitution Act, 1982*.[84]

94. With respect to its concurrent jurisdiction under s. 17 of the *Federal Courts Act*, the only relevant requirements are that relief be sought against the Crown and that the law upon which the Court's jurisdiction is exercised be among the "laws of Canada" referenced in s. 101 of the *Constitution Act, 1867*.

95. The *raison d'être* of the Federal Court would be stymied by the unnecessary abdication to the provincial superior courts of jurisdiction over issues of a quintessentially federal character simply because, as an accident of history, the "supreme law of Canada" at issue was formally enacted by the Imperial Parliament for and on behalf of Canada.

D. SHOULD THE APPLICANT BE GRANTED LEAVE TO AMEND THE NOTICE OF APPLICATION?

96. At a case management conference on February 16, 2015, the Applicant sought directions regarding amendments to the Notice of Application. Some of the amendments sought are intended to clarify and refine the issues before the Court and elaborate upon the factual circumstances giving rise to the application. Other amendments are intended to respond to and address the Respondents' objections outlined in the notice of motion to strike the application.

97. Case Management Judge Lafrenière ordered that "any application or submissions that the Applicant may wish to make with respect to amendments to the Notice of Application … should be included in the Applicant's motion

[84] Wruck, *supra* note 71 at 725-727 (Emphasis added). (App. BoA II, pp. 696-697)

record in response to the Respondents' motion to strike."[85]

98. As well, before striking out pleadings, the Court must consider whether the responding party should be permitted to make amendments that could cure the defects identified by the Court.[86]

99. Attached as Schedule "A" to this motion record is a proposed draft that reflects those amendments that the Applicant seeks to make under Rule 75 even in the absence of any "defects" to be cured following the Court's determination of the motion to strike.

100. If the Court determines that the application is non-justiciable by reason only that it requests relief that reflects the *de facto* exercise of power by the Prime Minister, which in turn depends on recognition of an "unenforceable" constitutional convention, the Applicant requests leave to make amendments to the requested relief by removing references to the Prime Minister's role in the appointment process.

101. If the Court concludes that the application raises justiciable issues but does not engage the Court's jurisdiction under s. 18 of the *Federal Courts Act*, the Applicant requests leave to convert the application to an action for declaratory relief under s. 17 and 18.4 of the *Federal Courts Act* and Rules 57, 64 and 75 with an opportunity to substitute the notice of application with a statement of claim.

E. COSTS

102. If the motion is granted on grounds of non-justiciability, it follows that the Prime Minister's compliance with the constitutional requirements for filling Senate vacancies is not a matter for the Courts to determine but a question to be decided by voters as a "ballot box" issue. This finding would provide

[85] Applicant's Motion Record at pp. 1-2.
[86] *Simon v. Canada*, 2011 FCA 6 at para. 8. (App. BoA II, pp. 483-484)

significant clarity for the public at large.

103. If the motion is granted for want of jurisdiction, the issues fall to be litigated in the provincial superior courts. In such case, the Applicant's attempt to raise these issued in the Federal Court reflects a good faith intention to respect the Court's role and jurisdiction over the federal exercise of power and ought not to be penalized.

104. In either scenario, it is respectfully submitted that the Applicant's role as a genuine public interest litigant warrants relief from adverse costs liability.[87] Given the Respondents' superior capacity to bear the cost of the proceeding, applying the normal two-way costs regime in these circumstances would serve no purpose other than deterrence.

105. If the motion is dismissed, and the issues of justiciability and jurisdiction are conclusively determined such that the same objections are *res judicata* and cannot be raised again at the hearing of the application on its merits, the Applicant concedes the necessity of responding to these issues in any event and the appropriateness of seeking their determination at an early stage. In such case, the Applicant submits that an award of costs payable by the Respondents *in the cause* is appropriate, and that costs should be fixed in the amount of $1,000.

106. Alternatively, if the motion is dismissed but the Court is unable to conclusively determine the issues of justiciability and jurisdiction such that these issues will need to be re-argued at the hearing of the application, the Respondents' pursuit of a motion to strike an application for judicial review will have resulted in a waste of time and expense notwithstanding the Courts' clear direction to reserve such exceptional motions for "clearly improper" cases rather than those raising "simply a debatable issue".[88]

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[87] *Mcewing v. Canada (Attorney General)*, 2013 FC 953. (App. BoA I, pp. 242-260)
[88] *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C.R. 588, 1994 CanLII 3529 (FCA). (Resp. BoA I, Tab 6)

107. In such case, in order to deter future disregard for the "proper way to contest" an application for judicial review, namely to "appear and argue at the hearing of the [application] itself",[89] the Applicant submits that it would appropriate to order the costs of the motion be fixed and payable forthwith.[90]

PART IV – ORDER SOUGHT

108. The Applicant respectfully requests the Court to issue the following order:

a) the Respondents' motion to strike is dismissed with prejudice to the Respondents' ability to raise the same issues in response to the application;

b) the Applicant is granted leave to amend the notice of application to reflect:

i) the amendments proposed in Schedule "A" to the Applicant's motion record; and

ii) any issues raised at the hearing of the Respondents' motion to strike within ten (10) days of the issuance of the Court's reasons for order;

c) costs of the motion are payable by the Respondents to the Applicant in the cause, fixed in the amount of $1000.00.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Aniz Alani
Applicant

March 19, 2015

[89] *Ibid*.
[90] *Federal Courts Rules*, R. 401. (Applicant's Motion Record, Appendix A)

PART V – LIST OF AUTHORITIES

Case Law

Secondary Sources

Parliamentary Debates

Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, 39th Parliament, 2nd Session, No. 17 (7 May 2008)	App. BoA II, pp. 704-730

Statutes and Regulations

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5., Preamble, ss. 9, 11, 12, 13, 17, 21-24, 26-35, 101

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 52-53, Schedule

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2, 17, 18, 18.1, 18.4, 18.5, 57

Federal Courts Rules, S.O.R./1998-106, r. 3, 57, 64, 75, 220, 221, 303, 401

Letters Patent Constituting the Office of the Governor General of Canada, 1947, R.S.C. 1985, Appendix II, No. 31, Art. II

Minutes of Council

P.C. 1896 – 1853 (May 1, 1896)	Resp. BoA II, Tab 27
P.C. 1896 – 2710 (July 13, 1896)	Resp. BoA II, Tab 28
P.C. 1935 – 3374 (October 23, 1935)	Resp. BoA II, Tab 29

Schedule "A"

Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA,
THE QUEEN'S PRIVY COUNCIL FOR CANADA and
THE GOVERNOR GENERAL OF CANADA

Respondents

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court in Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of *the Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date:

Issued by: _____
(Registry Officer)

Address of local office: Federal Court
Courts Administration Service
P.O. Box 11065, 3rd Floor
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO:

THE PRIME MINISTER OF CANADA
80 Wellington Street
Ottawa, ON K1A 0A2

THE QUEEN'S PRIVY COUNCIL FOR CANADA
85 Sparks Street
Ottawa, ON K1A 0A3

THE GOVERNOR GENERAL OF CANADA
1 Sussex Drive
Ottawa, ON K1A 0A1

ATTORNEY GENERAL OF CANADA
284 Wellington St.
Ottawa, ON K1A 0H8

DEPARTMENT OF JUSTICE CANADA
British Columbia Regional Office
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of the ~~decision~~ failure, refusal or unreasonable delay of the Prime Minister, or alternatively the Queen's Privy Council for Canada acting on the recommendation of the Prime Minister, ~~as communicated publicly on December 4, 2014, not~~ to advise the Governor General to summon fit and qualified Persons to fill existing Vacancies in the Senate.

THE APPLICANT makes application for:

1) A declaration that a qualified Person must be summoned to the Senate within a reasonable time after a Vacancy happens in the Senate;~~:~~

~~a) the Prime Minister of Canada must advise the Governor General to summon a qualified Person to the Senate within a reasonable time after a Vacancy happens in the Senate.~~

~~b) the deliberate failure to advise the Governor General to summon a fit and qualified Person to fill a Vacancy in the Senate within a reasonable time after the Vacancy happens~~

~~i) is contrary to section 32 of the *Constitution Act, 1867*;~~

~~ii) is contrary to section 22 of the *Constitution Act, 1867*~~

~~(1) to the extent the Vacancies when considered in the aggregate deny a province or territory of the proportion of regional representation set out in section 22 of the *Constitution Act, 1867*, and~~

~~(2) to the extent that a Vacancy deprives a province or territory of the minimum number of representatives in the Senate set out in section 22 of the *Constitution Act, 1867*;~~

~~iii) undermines and breaches the principles of~~

~~(1) federalism,~~

~~(2) democracy,~~

~~(3) constitutionalism,~~

~~(4) the rule of law, and~~

~~(5) the protection of minorities,~~

~~and underlying constitutional imperatives, as enunciated by the Supreme Court of Canada in *the Quebec Secession Reference*; and~~

~~iv) is unlawful absent an amendment to the Constitution of Canada according to the constitutional formula as set out in section 41 of the *Constitution Act, 1982*;~~

2) An Order for costs of this application on a basis that this Honourable Court deems just; and

3) Such further or other relief as this Honourable Court deems just.

THE GROUNDS for the application are:

1) Section 32 of the *Constitution Act, 1867* provides:

> "When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified person fill the Vacancy."

2) Section 21 of the *Constitution Act, 1867* provides that "[t]he Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators."

3) There are currently ~~16~~ 18 Vacancies in the Senate.

4) There are currently 87 Senators in the Senate, not excluding suspensions.

5) Of the 105 Senate positions, the constitutionally established allocation and the currently existing actual distribution among the provinces and territories, not

excluding suspensions, are as follows:

Province or Territory	Number of Senators Allocated by Section 22 of *Constitution Act, 1867*	Actual Current Distribution of Senators	Current Vacancies
Ontario	24	19	5
Quebec	24	20	4
Nova Scotia	10	8	2
New Brunswick	10	8	2
Prince Edward Island	4	3	1
Manitoba	6	3	3
British Columbia	6	5	1
Saskatchewan	6	6	0
Alberta	6	6	0
Newfoundland and Labrador	6	6	0
Yukon Territory	1	1	0
Northwest Territories	1	1	0
Nunavut	1	1	0
Total	**105**	**87**	**18**

6) The Senate has not had 105 appointed Senators since September 6, 2012.

7) No person has been appointed to the Senate since March 25, 2013.

8) Vacancies happen in the Senate upon the resignation, death, or disqualification of a Senator, when a Senator reaches the age of 75, and upon the addition of four or eight Senators where permitted by section 26 of the *Constitution Act, 1867*.

9) The text of section 24 of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General:

> **24.** The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

10) In the *Senate Reform Reference*, the Supreme Court of Canada confirmed: "In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada when filling Senate vacancies."

~~11) By constitutional convention, appointments to the Senate are made on the advice of the Prime Minister.~~

12) The Prime Minister's ~~decision not~~ failure to recommend appointments to the Senate to fill the Vacancies reflects an impermissible attempt to make changes to the Senate without undertaking the constitutional reforms required in light of the amending formula set out in the *Constitution Act, 1982* as interpreted by the Supreme Court of Canada in the *Senate Reform Reference*.

13) The failure to summon a fit and qualified Person to fill a Vacancy in the Senate within a reasonable time after the Vacancy happens undermines and breaches sections 21, 22 and 32 of the *Constitution Act, 1867*, and the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities, and underlying constitutional imperatives, as enunciated by the Supreme Court of Canada in *the Quebec Secession Reference*.

14) Section 18(1) of the *Federal Courts Act* grants the Federal Court exclusive jurisdiction to grant declaratory relief against any federal board, commission or other tribunal, and to hear and determine any application or other proceeding for relief against a federal board, commission or other tribunal.

15) Section 18.1(3) of the *Federal Courts Act* empowers the Federal Court to order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing.

16) The Prime Minister, or alternatively the Queen's Privy Council for Canada acting on the recommendation of the Prime Minister, is a federal board, commission or other tribunal, being a body, person or persons having,

exercising or purporting to exercise jurisdiction or powers conferred by or under an order made pursuant to a prerogative of the Crown, when providing advice to the Governor General regarding the appointment of Senators.

17) Such further and other grounds as the applicant may identify and this Honourable Court may consider.

THIS APPLICATION will be supported by the following material:

1) Affidavit of Ashley Morton, sworn January 16, 2015, and served;

2) The record before the Prime Minister of Canada in determining when, if at all, to fill each of the currently existing Vacancies in the Senate; and

3) Such further and other material as the applicant may advise and this Honourable Court may allow.

THE APPLICANT REQUESTS the Prime Minister of Canada to send a certified copy of the record of all materials placed before and considered by the Prime Minister of Canada and the Queen's Privy Council for Canada in making the decision not to advise the Governor General to fill the currently existing Vacancies, to the applicant and to the Registry.

Dated at Vancouver, British Columbia this 8th day of December, 2014.
Amended:

ANIZ ALANI, on his own behalf
[redacted]
Tel: (604) 600-1156
E-Mail: senate.vacancies@anizalani.com

APPENDIX A

STATUTES AND REGULATIONS

Constitution Act, 1867 **(U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.**

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (*Dominion*) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni:

Declaration of Executive Power in the Queen

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

La Reine est investie du pouvoir exécutif

9. À la Reine continueront d'être et sont par la présente attribués le gouvernement et le pouvoir exécutifs du Canada.

Constitution of Privy Council for Canada

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

Constitution du conseil privé

11. Il y aura, pour aider et aviser, dans l'administration du gouvernement du Canada, un conseil dénommé le Conseil Privé de la Reine pour le Canada; les personnes qui formeront partie de ce conseil seront, de temps à autre, choisies et mandées par le Gouverneur-Général et assermentées comme Conseillers Privés; les membres de ce conseil pourront, de temps à autre, être révoqués par le gouverneur-général.

All Powers under Acts to be exercised by Governor General with Advice of Privy Council, or alone

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

Pouvoirs conférés au gouverneur-général, en conseil ou seul

12. Tous les pouvoirs, attributions et fonctions qui, — par une loi du parlement de la Grande-Bretagne, ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande, ou de la législature du Haut-Canada, du Bas-Canada, du Canada, de la Nouvelle-Écosse ou du Nouveau-Brunswick, lors de l'union, — sont conférés aux gouverneurs ou lieutenants-gouverneurs respectifs de ces provinces ou peuvent être par eux exercés, de l'avis ou de l'avis et du consentement des conseils exécutifs de ces provinces, ou avec la coopération de ces conseils, ou d'aucun nombre de membres de ces conseils, ou par ces gouverneurs ou lieutenants-gouverneurs individuellement, seront, — en tant qu'ils continueront d'exister et qu'ils pourront être exercés, après l'union, relativement au gouvernement du Canada, — conférés au gouverneur-général et pourront être par lui exercés, de l'avis ou de l'avis et du consentement ou avec la coopération du Conseil Privé de la Reine pour le Canada ou d'aucun de ses membres, ou par le gouverneur-général individuellement, selon le cas; mais ils pourront, néanmoins (sauf ceux existant en vertu de lois de la Grande-Bretagne ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande), être révoqués ou modifiés par le parlement du Canada.

Application of Provisions referring to Governor General in Council

13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

Application des dispositions relatives au gouverneur-général en conseil

13. Les dispositions de la présente loi relatives au gouverneur-général en conseil seront interprétées de manière à s'appliquer au gouverneur-général agissant de l'avis du Conseil Privé de la Reine pour le Canada.

Constitution of Parliament of Canada

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Number of Senators

21. The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators.

Representation of Provinces in Senate

22. In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:

1. Ontario;

2. Quebec;

3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;

4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six

Constitution du parlement du Canada

17. Il y aura, pour le Canada, un parlement qui sera composé de la Reine, d'une chambre haute appelée le Sénat, et de la Chambre des Communes.

Nombre de sénateurs

21. Sujet aux dispositions de la présente loi, le Sénat se composera de cent cinq membres, qui seront appelés sénateurs.

Représentation des provinces au Sénat

22. En ce qui concerne la composition du Sénat, le Canada sera censé comprendre quatre divisions :

1. Ontario;

2. Québec;

3. les provinces Maritimes — la Nouvelle-Écosse et le Nouveau-Brunswick — ainsi que l'Île-du-Prince-Édouard;

4. les provinces de l'Ouest : le Manitoba, la Colombie-Britannique, la Saskatchewan et l'Alberta;

les quatre divisions doivent (subordonnément aux révisions de la présente loi) être également représentées dans le Sénat, ainsi qu'il suit : — Ontario par vingt-quatre sénateurs; Québec par vingt-quatre sénateurs; les Provinces maritimes et l'Île-du-Prince-Édouard par vingt-quatre sénateurs, dont dix représentent la Nouvelle-Écosse, dix le Nouveau-Brunswick, et quatre l'Île-du-Prince-Édouard; les Provinces de l'Ouest par vingt-quatre sénateurs, dont six représentent

thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented in the Senate by one member each.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

le Manitoba, six la Colombie-Britannique, six la Saskatchewan et six l'Alberta; la province de Terre-Neuve aura droit d'être représentée au Sénat par six sénateurs; le territoire du Yukon, les territoires du Nord-Ouest et le territoire du Nunavut ont le droit d'être représentés au Sénat par un sénateur chacun.

En ce qui concerne la province de Québec, chacun des vingt-quatre sénateurs la représentant, sera nommé pour l'un des vingt-quatre collèges électoraux du Bas-Canada énumérés dans la cédule A, annexée au chapitre premier des statuts refondus du Canada.

Qualifications of Senator

23. The Qualifications of a Senator shall be as follows:

(1) He shall be of the full age of Thirty Years;

(2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged

Qualités exigées des sénateurs

23. Les qualifications d'un sénateur seront comme suit :

1. Il devra être âgé de trente ans révolus;

2. Il devra être sujet-né de la Reine, ou sujet de la Reine naturalisé par loi du parlement de la Grande-Bretagne, ou du parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande, ou de la législature de l'une des provinces du Haut-Canada, du Bas-Canada, du Canada, de la Nouvelle-Écosse, ou du Nouveau-Brunswick, avant l'union, ou du parlement du Canada, après l'union;

3. Il devra posséder, pour son propre usage et bénéfice, comme propriétaire en droit ou en équité, des terres ou tenements tenus en franc et commun socage, — ou être en bonne saisine ou possession, pour son propre usage et bénéfice, de terres ou tenements tenus en franc-alleu ou en roture dans la province pour laquelle il est nommé, de la valeur de quatre mille piastres en sus de toutes rentes, dettes, charges, hypothèques et redevances qui peuvent être attachées, dues et payables sur ces

on or affecting the same;

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

Summons of Senator

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

Addition of Senators in certain cases

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.

Reduction of Senate to normal Number

27. In case of such Addition being at any Time made, the Governor General shall not

immeubles ou auxquelles ils peuvent être affectés;

4. Ses propriétés mobilières et immobilières devront valoir, somme toute, quatre mille piastres, en sus de toutes ses dettes et obligations;

5. Il devra être domicilié dans la province pour laquelle il est nommé;

6. En ce qui concerne la province de Québec, il devra être domicilié ou posséder sa qualification foncière dans le collège électoral dont la représentation lui est assignée.

Nomination des sénateurs

24. Le gouverneur-général mandera de temps à autre au Sénat, au nom de la Reine et par instrument sous le grand sceau du Canada, des personnes ayant les qualifications voulues; et, sujettes aux dispositions de la présente loi, les personnes ainsi mandées deviendront et seront membres du Sénat et sénateurs.

Nombre de sénateurs augmenté en certains cas

26. Si en aucun temps, sur la recommandation du gouverneur-général, la Reine juge à propos d'ordonner que quatre ou huit membres soient ajoutés au Sénat, le gouverneur-général pourra, par mandat adressé à quatre ou huit personnes (selon le cas) ayant les qualifications voulues, représentant également les quatre divisions du Canada, les ajouter au Sénat.

Réduction du Sénat au nombre régulier

27. Dans le cas où le nombre des sénateurs serait ainsi en aucun temps augmenté, le

summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more.

gouverneur-général ne mandera aucune personne au Sénat, sauf sur pareil ordre de la Reine donné à la suite de la même recommandation, tant que la représentation de chacune des quatre divisions du Canada ne sera pas revenue au nombre fixe de vingt-quatre sénateurs.

Maximum Number of Senators

28. The Number of Senators shall not at any Time exceed One Hundred and thirteen.

Maximum du nombre des sénateurs

28. Le nombre des sénateurs ne devra en aucun temps excéder cent treize.

Tenure of Place in Senate

29. (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years.

Sénateurs nommés à vie

29. (1) Sous réserve du paragraphe (2), un sénateur occupe sa place au Sénat sa vie durant, sauf les dispositions de la présente loi.

(2) Un sénateur qui est nommé au Sénat après l'entrée en vigueur du présent paragraphe occupe sa place au Sénat, sous réserve de la présente loi, jusqu'à ce qu'il atteigne l'âge de soixante-quinze ans.

Resignation of Place in Senate

30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

Les sénateurs peuvent se démettre de leurs fonctions

30. Un sénateur pourra, par écrit revêtu de son seing et adressé au gouverneur-général, se démettre de ses fonctions au Sénat, après quoi son siège deviendra vacant.

Disqualification of Senators

31. The Place of a Senator shall become vacant in any of the following Cases:

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience,

Cas dans lesquels les sièges des sénateurs deviendront vacants

31. Le siège d'un sénateur deviendra vacant dans chacun des cas suivants :

1. Si, durant deux sessions consécutives du parlement, il manque d'assister aux séances du Sénat;

2. S'il prête un serment, ou souscrit une

or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;

(4) If he is attainted of Treason or convicted of Felony or of any infamous Crime;

(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

déclaration ou reconnaissance d'allégeance, obéissance ou attachement à une puissance étrangère, ou s'il accomplit un acte qui le rend sujet ou citoyen, ou lui confère les droits et les privilèges d'un sujet ou citoyen d'une puissance étrangère;

3. S'il est déclaré en état de banqueroute ou de faillite, ou s'il a recours au bénéfice d'aucune loi concernant les faillis, ou s'il se rend coupable de concussion;

4. S'il est atteint de trahison ou convaincu de félonie, ou d'aucun crime infamant;

5. S'il cesse de posséder la qualification reposant sur la propriété ou le domicile; mais un sénateur ne sera pas réputé avoir perdu la qualification reposant sur le domicile par le seul fait de sa résidence au siège du gouvernement du Canada pendant qu'il occupe sous ce gouvernement une charge qui y exige sa présence.

Summons on Vacancy in Senate

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Nomination en cas de vacance

32. Quand un siège deviendra vacant au Sénat par démission, décès ou toute autre cause, le gouverneur-général remplira la vacance en adressant un mandat à quelque personne capable et ayant les qualifications voulues.

Questions as to Qualifications and Vacancies in Senate

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

Questions quant aux qualifications et vacances, etc.

33. S'il s'élève quelque question au sujet des qualifications d'un sénateur ou d'une vacance dans le Sénat, cette question sera entendue et décidée par le Sénat.

Appointment of Speaker of Senate

34. The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead.

Orateur du Sénat

34. Le gouverneur-général pourra, de temps à autre, par instrument sous le grand sceau du Canada, nommer un sénateur comme orateur du Sénat, et le révoquer et en nommer un autre à sa place.

Quorum of Senate

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

Quorum du Sénat

35. Jusqu'à ce que le parlement du Canada en ordonne autrement, la présence d'au moins quinze sénateurs, y compris l'orateur, sera nécessaire pour constituer une assemblée du Sénat dans l'exercice de ses fonctions.

General Court of Appeal, etc.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Cour générale d'appel, etc.

101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

***Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets

the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

Abrogation et nouveaux titres

53. (1) Les textes législatifs et les décrets énumérés à la colonne I de l'annexe sont abrogés ou modifiés dans la mesure indiquée à la colonne II. Sauf abrogation, ils restent en vigueur en tant que lois du Canada sous les titres mentionnés à la colonne III.

(2) Tout texte législatif ou réglementaire, sauf la *Loi de 1982 sur le Canada*, qui fait mention d'un texte législatif ou décret figurant à l'annexe par le titre indiqué à la colonne I est modifié par substitution à ce titre du titre correspondant mentionné à la colonne III; tout Acte de l'Amérique du Nord britannique non mentionné à l'annexe peut être cité sous le titre de *Loi constitutionnelle* suivi de l'indication de l'année de son adoption et éventuellement de son numéro.

SCHEDULE TO THE CONSTITUTION ACT, 1982

1.British North America Act, 1867, 30-31 Vict., c. 3 (U.K.) […]

ANNEXE DE LA LOI CONSTITUTIONNELLE DE 1982

1.Acte de l'Amérique du Nord britannique, 1867, 30-31 Victoria, c. 3 (R.-U.)

***Federal Courts Act*, R.S.C. 1985, c. F-7**

Definitions

2. (1) In this Act,

[…]

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867* ;

Relief against the Crown

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

[…]

(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

[…]

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

[…]

«office fédéral» Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

Réparation contre la Couronne

17. (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

[…]

(3) Elle a compétence exclusive, en première instance, pour les questions suivantes:

[…]

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de

Exchequer Court of Canada.

l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Extraordinary remedies, federal tribunals

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[…]

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Recours extraordinaires : offices fédéraux

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[…]

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai

tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) On an application for judicial review, the Federal Court may

> (*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

> (*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

> *a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
>
> *b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

> *a*) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
>
> *b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
>
> *c*) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
>
> *d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
>
> *e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

f) a agi de toute autre façon contraire à la loi.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

Exception to sections 18 and 18.1

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

Dérogation aux art. 18 et 18.1

18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

Constitutional questions

57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is

Questions constitutionnelles

57. (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour

in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.

(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal or application for judicial review made in respect of the constitutional question.

(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, in respect of the constitutional question.

(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

(2) L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

(3) Les avis d'appel et de demande de contrôle judiciaire portant sur une question constitutionnelle sont à signifier au procureur général du Canada et à ceux des provinces.

(4) Le procureur général à qui un avis visé aux paragraphes (1) ou (3) est signifié peut présenter une preuve et des observations à la Cour d'appel fédérale ou à la Cour fédérale et à l'office fédéral en cause, à l'égard de la question constitutionnelle en litige.

(5) Le procureur général qui présente des observations est réputé partie à l'instance aux fins d'un appel portant sur la question constitutionnelle.

***Federal Courts Rules*, S.O.R./1998-106**

General principle

3. These Rules shall be interpreted and

Principe général

3. Les présentes règles sont interprétées et

applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Wrong originating document

57. An originating document shall not be set aside only on the ground that a different originating document should have been used.

Non-annulation de l'acte introductif d'instance

57. La Cour n'annule pas un acte introductif d'instance au seul motif que l'instance aurait dû être introduite par un autre acte introductif d'instance.

Declaratory relief available

64. No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed.

Jugement déclaratoire

64. Il ne peut être fait opposition à une instance au motif qu'elle ne vise que l'obtention d'un jugement déclaratoire, et la Cour peut faire des déclarations de droit qui lient les parties à l'instance, qu'une réparation soit ou puisse être demandée ou non en conséquence.

Amendments with leave

75. (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

(*a*) the purpose is to make the document accord with the issues at the hearing;

(*b*) a new hearing is ordered; or

(*c*) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

Modifications avec autorisation

75. (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

(2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :

a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;

b) une nouvelle audience est ordonnée;

c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner

suite aux prétentions nouvelles ou révisées.

Preliminary determination of question of law or admissibility

220. (1) A party may bring a motion before trial to request that the Court determine

(*a*) a question of law that may be relevant to an action;

(*b*) a question as to the admissibility of any document, exhibit or other evidence; or

(*c*) questions stated by the parties in the form of a special case before, or in lieu of, the trial of the action.

(2) Where, on a motion under subsection (1), the Court orders that a question be determined, it shall

(*a*) give directions as to the case on which the question shall be argued;

(*b*) fix time limits for the filing and service of motion records by the parties; and

(*c*) fix a time and place for argument of the question.

(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.

Décision préliminaire sur un point de droit ou d'admissibilité

220. (1) Une partie peut, par voie de requête présentée avant l'instruction, demander à la Cour de statuer sur :

a) tout point de droit qui peut être pertinent dans l'action;

b) tout point concernant l'admissibilité d'un document, d'une pièce ou de tout autre élément de preuve;

c) les points litigieux que les parties ont exposés dans un mémoire spécial avant l'instruction de l'action ou en remplacement de celle-ci.

(2) Si la Cour ordonne qu'il soit statué sur l'un des points visés au paragraphe (1), elle :

a) donne des directives sur ce qui doit constituer le dossier à partir duquel le point sera débattu;

b) fixe les délais de dépôt et de signification du dossier de requête;

c) fixe les date, heure et lieu du débat.

(3) La décision prise au sujet d'un point visé au paragraphe (1) est définitive aux fins de l'action, sous réserve de toute modification résultant d'un appel.

Motion to strike

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

Requête en radiation

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

(*a*) discloses no reasonable cause of action or defence, as the case may be,

(*b*) is immaterial or redundant,

(*c*) is scandalous, frivolous or vexatious,

(*d*) may prejudice or delay the fair trial of the action,

(*e*) constitutes a departure from a previous pleading, or

(*f*) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

(2) No evidence shall be heard on a motion for an order under paragraph (1)(*a*).

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)*a*).

Respondents

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

(*b*) required to be named as a party under an Act of Parliament pursuant to which the application is brought.

Défendeurs

303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur:

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

Costs of motion

401. (1) The Court may award costs of a motion in an amount fixed by the Court.

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

Dépens de la requête

401. (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

***Letters Patent Constituting the Office of the Governor General of Canada, 1947,* R.S.C. 1985, Appendix II, No. 31**

His Powers and Authorities

II. And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but not so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the Constitution Acts, 1867 to 1940 and the powers and authorities hereinafter conferred in these Letters Patent and in such Commission as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be in force in Canada.

Ses pouvoirs et attributions

II. Et, par les présentes, Nous autorisons Notre gouverneur général, sur l'avis de Notre Conseil privé pour le Canada, ou de tous membres duditConseil ou individuellement, selon l'exigence du cas, à exercer tous les pouvoirs et attributions dont Nous sommes validement investi à l'égard du Canada, et, pour plus de certitude, mais sans restreindre la portée générale do ce qui précède, à faire et exécuter, de la manière susdite, tout co qui peut ressortir à sa charge et à la confiance que nous avons mise en lui en conformité des divers pouvoirs et attributions qui lui ont été accordés ou destinés en vertu des Actes de l'Amérique du Nord britannique, de 1867 à 1946, et des pouvoirs et attributions ci-après conférés par les présentes lettres patentes et dans toute commission qui pourra lui être décernée sous Notre Grand Seeau du Canada et sous le régime des lois qui sont ou pourront être en vigueur au Canada.